STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MANUEL LEE WADE,

Defendant-Appellant.

UNPUBLISHED
September 10, 2002

No. 230378
Kent Circuit Court
LC No. 99-006753-FH

Before: Talbot, P.J., and Cooper and D. P. Ryan*, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(b), for which he was sentenced as an habitual offender, third offense, MCL 769.11, to a prison term of fifteen to forty years. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In his original brief, defendant asserted that the trial court improperly denied the jury's request to rehear the victim's testimony during deliberations. Defendant failed to preserve this issue by objecting to the instruction given. *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). Therefore, review is precluded unless the defendant demonstrates a plain error that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A trial court abuses its discretion when it both denies a request to rehear testimony and forecloses the possibility that such a rehearing will ever be granted. *People v Robbins*, 132 Mich App 616, 621; 347 NW2d 765 (1984). A trial court properly exercises its discretion when it directs a jury to deliberate further without rehearing the testimony so long as the possibility of having the testimony read at a later time is not foreclosed. MCR 6.414(H); *People v Johnson*, 128 Mich App 618, 622; 341 NW2d 160 (1983). Both the reading back of testimony and the extent of reading are matters within the trial court's discretion and are thus reviewed for an abuse of discretion. *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974).

The trial court's instruction does not require reversal. Unlike the situation in *People v Henry Smith*, 396 Mich 109, 110; 240 NW2d 202 (1976), wherein the court told the jury, "I will not reread any testimony, so don't ask for that," the court's statement that a transcript was not

* Circuit judge, sitting on the Court of Appeals by assignment.

available and wouldn't be available until the next day at the earliest did not completely foreclose the possibility of having the testimony read back. Cf. *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996), and *People v Harvey*, 121 Mich App 681, 685-687; 329 NW2d 456 (1982) (declining a request for testimony "at this time" did not foreclose possibility of having testimony read at a later time). Moreover, it is unlikely that any error affected the verdict because the jury found defendant guilty of the one count that was corroborated by independent evidence of sexual abuse. See *People v Martin*, 77 Mich App 76, 78; 257 NW2d 668 (1977).

In his supplemental brief, defendant raises three additional errors, none of which merit relief. Defendant's claim that the court erred in reading CJI2d 20.25 was waived by defense counsel's statement to the trial court that he had no objections to the instructions apart from the wording of the verdict form. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). Defendant's ancillary claim that MCL 750.520h and CJI2d 20.25 are unconstitutional has been abandoned due to his failure to brief the merits of the claim or to cite any applicable authority in support. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000); *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

Defendant's claim regarding the sufficiency of the proofs establishing the date of the offense as alleged in the information is without merit. The information alleged that the offense occurred on or about June 29, 1999 and the testimony of the victim and a detective established that defendant committed the offense on that date. Even if the victim had been mistaken about the specific date, a variance as to the time of the offense is not fatal "unless time is of the essence of the offense." MCL 767.45(1)(b). "Time is not of the essence nor a material element in a criminal sexual conduct case, at least where the victim is a child." *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987).

Finally, defendant contends that he was denied effective assistance of counsel because his attorney failed to raise the two issues discussed above. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

> To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001) (citations omitted).]

The trial court misread CJI2d 20.25. Rather than instruct the jury that the prosecutor was not required to introduce evidence to corroborate the victim's testimony, the court told the jury that "it is not necessary to believe other evidence other than [the victim] if that testimony proves guilt beyond a reasonable doubt." That instruction was consistent with established law that it is solely within the province of the jury to decide what evidence, if any, to believe. *People v Herndon*, 246 Mich App 371, 390 n 29; 633 NW2d 376 (2001); *People v Gaydosh*, 203 Mich

App 235, 238-239; 512 NW2d 65 (1994); CJI2d 3.1(3). Given that plus the fact that the victim's testimony was corroborated by forensic evidence, it is unlikely that the court's misreading of CJI2d 20.25 affected the outcome of the trial and thus defendant has not shown that he was prejudiced by counsel's failure to object.

As noted above, there was no error with respect to the proofs regarding the time of the offense and thus counsel was not ineffective for failing to object. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Affirmed.

/s/ Michael J. Talbot
/s/ Jessica R. Cooper
/s/ Daniel P. Ryan